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No. 85-1289

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE VEILLETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence obtained pursuant to a search warrant must be suppressed if the warrant affidavit includes information obtained during a prior illegal entry, even if the affidavit establishes probable cause without consideration of the tainted information.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 97-120) is reported at 778 F.2d 899. The decision of the district court (Pet. App. 1-96) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1985. The petition for a writ of certiorari was filed on January 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maine, petitioner and eight co-defendants were convicted of conspiracy to possess a quantity of marijuana in excess of 1000 pounds with intent to distribute it, in

violation of 21 U.S.C. 846 (Pet. App. 98).[1] He was sentenced to fourteen years' imprisonment.

1. The evidence showed that on July 29, 1982, Drug Enforcement Administration agents in Maine received information from their counterparts in Atlanta, Georgia. The Atlanta agents advised that two suspects in a drug smuggling investigation had just boarded a flight for Bangor, and that the trip was believed to be in connection with the shipment of 40,000 pounds of marijuana to New England. Pet. App. 1-2. Investigators observed the suspects deplane at the Bangor International Airport and followed them to a hotel. As a result of subsequent surveillance of the two suspects and their associates, the investigators came to believe that a major marijuana sale was imminent and that a motorcycle shop owned by petitioner was to be used as a storage place for the contraband. Pet. App. 99-100.

On the morning of July 4, 1982, while the police had the motorcycle shop under surveillance, they observed a yellow truck, which previously had been linked to the suspects, back up to the building and remain for a period of time while it apparently was loaded. After the truck left the shop and proceeded south on Interstate Route 95, it was stopped by law enforcement officers who arrested the occupants. Using a key found during the search of one of the persons arrested, an agent unlocked and searched the back of the truck. The search revealed that the truck was carrying 60 bales of marijuana. Pet. App. 29-33, 100.

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[1]The co-defendants who were convicted at trial were Anthony Anello, Daniel Duval, James Michael Oliver, David Root, John Sachs, Fred R. Verderame, Walter Wendolkowski, and Gervasio Guillen. Of the 19 defendants originally indicted, four others entered pleas of guilty, two were acquitted by the jury, and four remain at large. See *United States* v. *Anello*, 765 F.2d 253, 255 (1st Cir. 1985), cert. denied, No. 85-679 (Nov. 18, 1985).

Following this discovery, the police decided to conduct simultaneous raids of various locations that they believed to be associated with the distribution operation, including petitioner's shop and his adjacent home. At approximately 3:00 p.m., a State Police sergeant led a contingent of officers to the motorcycle shop. They observed that the windows were covered with an opaque black material, that the door was locked, and that a sign notified potential customers that the shop was closed. When the sergeant's inquiries failed to evoke a response from inside, he broke the glass of the door and several officers entered the shop. The officers first walked through the store to see if anyone was hiding inside the building, looking "only in places large enough to hold a person" (Pet. App. 40). They then proceeded to a lower level where they spotted petitioner's pickup truck. They unsnapped a tarpaulin that was covering the bed of the truck and saw two marijuana bales there. The officers then replaced the tarpaulin and left the shop, but they kept the shop under guard from the outside until a search warrant could be obtained. Other officers were then dispatched to a summer cottage owned by petitioner, and they arrested him there. *Id.* at 40-41, 101-102.[2]

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[2]At approximately the same time, several armed agents converged on petitioner's nearby residence, where a party was underway. The agents assembled the guests and took their names before releasing them. They also conducted a warrantless sweep of the house, and they prohibited petitioner's wife from reentering the house without a police escort until after it was searched pursuant to a warrant. Pet. App. 41-44. Although petitioner devotes considerable attention to these police activities at the residence (see Pet. 7-10, 23-24), they are completely irrelevant to the issues considered by the court of appeals and presented in the petition. The district court suppressed all the evidence seized from the residence (Pet. App. 77-78), and that order was not challenged on appeal. Nor can it be alleged that the evidence seized from the motorcycle shop was in any way tainted by these activities at the residence.

The officers obtained warrants to search the motorcycle shop, petitioner's residence, and petitioner's summer cottage. The affidavits in support of the application for a warrant to search the motorcycle shop described numerous conversations, including a monitored telephone call from a hotel room to the shop, during which the parties discussed a drug transaction (Appellant's C.A. App. 194-204). The affidavits also described the loading of the yellow pickup truck at the shop and the fact that 60 bales of marijuana were later found in the truck (*id.* at 191, 201). In addition, the affidavits described the warrantless entry into the shop to secure the premises and the attendant discovery of marijuana in the truck bed (*id.* at 192). A warrant authorizing the search of the motorcycle shop was obtained and executed on the evening of July 6, 1982. The search resulted in the seizure of the two marijuana bales that had previously been observed in the truck bed and numerous additional items of incriminating evidence. Pet. App. 41.

Petitioner moved to suppress the evidence seized from motorcycle shop. The district court held that exigent circumstances justified the warrantless entry to secure the premises (Pet. App. 50-60). The court found, however, that the tarpaulin covering the pickup truck bed was secured in such a way that it was unreasonable to believe that anyone could have been hiding under it. Accordingly, the court held that the act of lifting the tarp and looking underneath was not a valid incident of a protective sweep and was therefore unlawful. The court therefore suppressed the marijuana found in the truck,[3] but it did not suppress the other evidence that was found during the warrant search of the shop (*id.* at 60-62).

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[3]This holding was not appealed by the government. Hence, the admissibility of this evidence observed during the warrantless entry was not at issue in the court of appeals and is not at issue in this Court.

2. Petitioner appealed, and the court of appeals affirmed (Pet. App. 97-120). The court of appeals disagreed with the district court's finding that exigent circumstances justified the warrantless entry into the shop (*id.* at 104-106). Relying on *Segura* v. *United States*, No. 82-5298 (July 5, 1984), however, the court held that the fact of the earlier unlawful entry did not render inadmissible the evidence that was discovered for the first time and seized during the warrant search. The court rejected petitioner's contention that the warrant was invalid because the affidavit described the discovery of the two bales of marijuana during the unlawful entry. Applying the principles of *Franks* v. *Delaware*, 438 U.S. 154 (1978), the court explained that the affidavit established probable cause even without reference to any information derived from the warrantless entry. Specifically, the court found that the information about the drug-related telephone calls and the discovery of 60 bales of marijuana in the truck that had just been loaded at the shop was "more than adequate in itself to establish probable cause for issuance of a search warrant" (Pet. App. 109-110). Judge Bownes dissented (*id.* at 114-119).

ARGUMENT

Petitioner contends (Pet. 14-30) that the court of appeals erred in applying *Segura* here because the affidavit for a warrant to search his shop contained information derived from the warrantless entry of the premises. This contention is without merit.

In *Segura*, the Court held that, despite an initial unlawful entry into the defendant's apartment to secure the premises, evidence discovered during a subsequent search pursuant to an untainted warrant was not subject to suppression because it was not a "fruit" of the unlawful entry. The Court explained (slip op. 17):

> Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which the evidence was seized. Exclusion of evidence as derivative or "fruit of the poisonous tree" is not warranted here because of that independent source.
>
> None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant.

Petitioner (Pet. 15-18) and the dissent (Pet. App. 115) seize upon this passage as demonstrating that when tainted evidence is mentioned in the affidavit the rule of *Segura* is not applicable. The Court, however, plainly made no such suggestion. Where tainted evidence is included in an affidavit, the relevant question is whether that evidence was needed to supply probable cause for the warrant. If so, the warrant and the evidence discovered pursuant to its execution are a product of the illegality. If probable cause exists independent of the tainted information, then the warrant is an independent source of the discovery of the evidence; the evidence is not in any sense the product of the illegality. Petitioner's contrary contention is at odds with the governing principle of *Segura* that "evidence will not be excluded as 'fruit' unless the illegality is at least the 'but for' cause of the discovery of the evidence" (slip op. 19).

Petitioner asserts (Pet. 14) that the court of appeals' decision "create[s] an intolerable conflict among the nation's lower courts." Petitioner, however, does not cite a single lower court decision to support this statement. In fact, it is

well established that even when a warrant affidavit contains some information that was obtained by means of an unlawful search, the evidence seized pursuant to the warrant is nonetheless admissible if the warrant contains sufficient untainted information to establish probable cause. See, *e.g.*, *United States* v. *Karo*, No. 83-850 (July 3, 1984), slip op. 15; *United States* v. *Alexander*, 761 F.2d 1294, 1300 (9th Cir. 1985)(collecting cases); *United States* v. *Smith*, 730 F.2d 1052, 1056 (6th Cir. 1984); *United States* v. *Williams*, 633 F.2d 742, 745 (8th Cir. 1980); *United States* v. *Marchand*, 564 F.2d 983, 1002 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); *James* v. *United States*, 418 F.2d 1150, 1152 (D.C. Cir. 1969). This rule was well stated by Justice Powell in his opinion in *United States* v. *Giordano*, 416 U.S. 505, 555 (1974): "[T]he inclusion in an affidavit of indisputably tainted allegations does not necessarily render the resulting warrant invalid. The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause." In this case, the court of appeals was plainly correct in concluding that the lawfully obtained information in the affidavit established probable cause to believe that evidence would be found in the motorcycle shop. Accordingly, neither the warrant nor the evidence discovered for the first time during the warrant search was the product of any illegality.

Petitioner advances no reason why it should be inappropriate to redact the warrant affidavit in this fashion—to excise information obtained in the course of a search that the court of appeals concluded was unlawful. In an analogous setting, it is well established that a warrant affidavit may be redacted if it contains intentionally or recklessly false information. See *Franks* v. *Delaware*, 438 U.S. 154

(1978). Judge Bownes objected in the court below (Pet. App. 118-119) that redaction in this setting is improper because the magistrate's determination is bound to be affected by the tainted information. That criticism, however, would be equally applicable to cases governed by *Franks*. Nonetheless, in the *Franks* setting, the Court has concluded that it is improper to suppress evidence seized under a warrant simply because certain superfluous information in the warrant affidavit was false. Similarly, in the present setting, as long as the court of appeals can determine that untainted portions of the affidavit established probable cause,[4] the warrant is not a product of the illegality. In such cases, the purposes of the exclusionary rule are not served by suppressing evidence that is discovered and seized as a result of the warrant process.[5]

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[4]We agree, of course, that where the warrant affidavit contains either false or unlawfully obtained information, the magistrate's finding of probable cause is not entitled to any deference. The court of appeals here, however, did not purport to rely on the magistrate's determination. Rather, it made an independent assessment of the affidavit and correctly concluded that it established probable cause without considering the information obtained during the warrantless entry into the motorcycle shop. See generally *United States* v. *Marchand*, 564 F.2d at 1002 (relevant question is whether untainted evidence would have justified issuance of a warrant, not whether magistrate would in fact have issued one).

[5]Petitioner also argues (Pet. 24-25) that *Segura* should not apply because a longer period of time elapsed in this case between the warrantless entry and the issuance of the search warrant. This contention completely misses the mark. In *Segura*, the Court and the dissenters were concerned about the extended period of time between the warrantless entry and the issuance of the warrant because the officers remained *inside* Segura's apartment during that time; the dissent characterized this period as an "independently unconstitutional" search and seizure (*Segura*, slip op. 4 (Stevens, J., dissenting)). Here, however, the officers did not remain inside the motorcycle shop; after the protective sweep, they left the shop and guarded it from the outside. During this period of time, it cannot seriously be alleged that the officers were engaged in any unconstitutional conduct (see, *e.g.*, *United States* v. *Flickinger*, 573

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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F.2d 1349, 1355-1356 (9th Cir.), cert. denied, 439 U.S. 836 (1978); *United States* v. *Hayes,* 518 F.2d 675, 678 (6th Cir. 1975); see also *Segura*, slip op. 8 n.15 (Stevens, J., dissenting)). The reasonableness of the time period taken to obtain the warrant therefore has no bearing on whether there was a Fourth Amendment violation in this case. Whatever constitutional violation occurred here was limited in duration to the short time that the protective sweep took; to the extent the 50-hour period that the shop was guarded from the outside pending the issuance of a warrant can be said to constitute a "seizure," it was a perfectly lawful seizure. In any event, even if the officers had secured the shop from the inside, as in *Segura*, the court of appeals' opinion correctly explains (Pet. App. 108) that the factual similarity to *Segura* is such that the rationale of *Segura* would also apply to the somewhat longer period taken to obtain the warrant in this case.